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FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

MUR 6019

DATE COMPLAINT FILED: 5/30/08

DATE OF NOTIFICATION: 6/5/08

LAST RESPONSE RECEIVED: 8/29/08

DATE ACTIVATED: 7/22/08

EXPIRATION OF SOL: 5/13/13

COMPLAINANT: Nancy C. Smith

**RESPONDENTS: Dominic Caserta for Assembly Committee
R. Michael Kasperzak**

**RELEVANT STATUTES: 2 U.S.C. § 431(20)(A)(iii)
2 U.S.C. § 431(22)
2 U.S.C. § 431(23)
2 U.S.C. § 441i(f)(1)
11 C.F.R. § 100.24(b)(3)
11 C.F.R. § 100.26
11 C.F.R. § 100.27
11 C.F.R. § 300.71**

INTERNAL REPORTS CHECKED: Commission Database

FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

The complaint alleges that a brochure distributed by the campaign of Dominic Caserta, a candidate for the California State Assembly, promoted the presidential candidacy of Barack Obama, and therefore was impermissibly paid for with non-federal funds. The brochure, which purpose clearly was to advocate Caserta's candidacy, identifies a local individual who is endorsing Caserta as a "Precinct Captain" of "Barack Obama for President" and includes a statement that the endorser (R. Michael Kasperzak)

1 supports Obama for the Democratic presidential nomination. Although there is a basis
2 for concluding that language in the brochure promotes Obama's candidacy, given the
3 small amount of money involved, we recommend that the Commission dismiss this
4 matter and admonish Dominic Caserta for Assembly Committee ("Caserta Committee").
5 We also recommend that the Commission find no reason to believe that Mr. Kasperzak
6 violated the Act.

7 **II. FACTUAL AND LEGAL ANALYSIS**

8 **A. Factual Background**

9 This matter focuses solely on a two-sided campaign brochure, of which the
10 Caserta Committee commissioned 60,000 copies at a total cost of \$4,336.97. See Invoice
11 attached to Caserta Committee's Response. The front of the brochure contains an
12 endorsement letter under the following letterhead:

13 **R. Michael Kasperzak**
14 **Precinct Captain In Santa Clara County**
15 **Barack Obama for President¹**
16

17 The endorsement, which advocates Caserta's election, begins with the following:

18 Dear Democratic Friend, whether you support Barack
19 Obama (as I do) or Hillary Clinton, there is one Democratic
20 candidate we can all agree on: **Dominic Caserta for State**
21 **Assembly.**
22

23 (emphasis in original). In addition to noting Kasperzak's association with the Obama
24 campaign in the letterhead, the signature block on the endorsement includes "Precinct
25 Captain in Santa Clara County, Barack Obama for President" as Kasperzak's title.

¹ Based on the letterhead, the notification letter sent to Kasperzak also referenced Barack Obama for President (Non-Federal). Neither CELA nor our independent research uncovered any information that any such entity actually exists. Thus, the notification was in error.

1 Kasperzak's name and title as Obama Precinct Captain appears at the return address
2 section of the brochure, along with a disclaimer identifying the Caserta Committee.

3 The back side of the brochure consists of a signed letter from Caserta stating that
4 he was thrilled that "we have two outstanding Democratic candidates running for
5 President," and that he has been endorsed by local leaders of the Barack Obama for
6 President campaign and spoke at a recent Hillary Clinton for President rally.
7 (emphasis in original). A picture of Caserta with then-Presidential candidate Hillary
8 Clinton appeared alongside the statement.

9 Complainant alleges that the brochure violates federal regulations prohibiting the
10 use of non-federal funds to promote federal candidates. The Caserta Committee denies
11 violating the relevant federal laws and asserts that the brochure is designed to promote
12 Caserta's State Assembly campaign, and does not solicit support for Barack Obama (or
13 Hillary Clinton). See Caserta Committee's Response. The Caserta Committee claims
14 that the Kasperzak letter was intended to support the statement (on the back of the
15 brochure) that Caserta's campaign has been endorsed by local leaders of Barack Obama
16 for President. *Id.* The Caserta Committee similarly claims that the picture of Hillary
17 Clinton and Caserta was intended to support the corresponding statement that Caserta had
18 spoken at a recent rally for Hillary Clinton.

19 Kasperzak, a former mayor and city council member of the City of Mountain
20 View, was a precinct captain for Obama's campaign during the California presidential
21 primary in February 2008 and is still a campaign volunteer for Obama's campaign. See
22 Kasperzak's Response. Kasperzak endorsed Caserta, volunteered in Caserta's campaign,
23 and offered Caserta's campaign the use of his name. He further explained that he

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1 provided Caserta's campaign with a copy of his signature for a mailing, but did not
2 authorize or was involved in the creation, development, or distribution of the brochure at
3 issue. *See* Kasperzak's Supplemental Response dated August 26, 2008.

4 **B. Discussion**

5 The Federal Election Campaign Act of 1971, as amended ("the Act"), and
6 Commission regulations prohibit state and local candidates or officeholders, or their
7 agents, from paying for a public communication that refers to a clearly identified
8 candidate for federal office (regardless of whether a candidate for state or local office is
9 also mentioned or identified), and that promotes or supports any candidate for that federal
10 office, or attacks or opposes any candidate for that federal office (regardless of whether
11 the communication expressly advocates a vote for or against a candidate) unless the funds
12 used to pay for the communication consist of federal funds that are subject to the
13 limitations, prohibitions, and reporting requirements of the Act. *See* 2 U.S.C.
14 § 441i(f)(1); 11 C.F.R. §§ 300.70 and 71.

15 In addition, a public communication that refers to a clearly identified candidate
16 for federal office and that promotes or supports a candidate for that office, or attacks or
17 opposes a candidate is one type of federal election activity. *See* 2 U.S.C.
18 § 431(20)(A)(iii); 11 C.F.R. § 100.24(b)(3). A public communication is a communication
19 by means of any broadcast, cable, or satellite communication, newspaper, magazine,
20 outdoor advertising facility, mass mailing, or telephone bank to the general public, or any
21 other form of general public political advertising. *See* 2 U.S.C. § 431(22); 11 C.F.R.
22 § 100.26. The brochure appears to qualify as a public communication, since the invoice
23 provided by the Caserta Committee shows that it was part of more than 500 pieces of

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1 mail matter of an identical or substantially similar nature within any 30-day period. See
2 2 U.S.C. § 431(23); 11 C.F.R. § 100.27. Therefore, whether there is a violation of the
3 Act and Commission regulations depends on whether the brochure promotes or supports
4 a named federal candidate and, if it was, whether it was paid for with federal funds.

5 The statement in the brochure that "we have two outstanding Democratic
6 candidates running for President" combined with the repeated references to Barack
7 Obama for President and more limited references to Hillary Clinton for President
8 arguably promotes Obama and Clinton in their capacity as presidential candidates.

9 The Caserta Committee's response suggests that the Obama and Clinton
10 references were intended merely to identify those candidates' respective campaigns.
11 However, the references go beyond the "mere identification" exception that the
12 Commission has previously allowed in several Advisory Opinions. See Advisory
13 Opinions 2007-34 (Jackson, Jr.), 2007-21 (Holt), and 2003-25 (Weinzapfel). In those
14 AOs, the Commission concluded that the use of a federal candidate's name or likeness in
15 a public communication solely for the purpose of endorsing a candidate for state office
16 does not run afoul of the Act and Commission regulations. Significantly, those AOs
17 addressed the use of the federal candidate's name and likeness and did not address the
18 specific reference to the federal candidacy ("for President") and the statement of support
19 that we have in this case. Therefore, the language in the brochure is distinguishable from
20 the circumstances presented in the AOs and does not warrant similar treatment.

21 Significantly, it does not appear that the brochure was paid for with federal funds.
22 The Caserta Committee is a nonfederal committee that is not registered with, nor
23 discloses its disbursements or receipts to, the Commission. Our review of its state

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1 disclosure reports indicates that the Caserta Committee may have had sufficient funds
2 subject to the limitations and prohibitions of the Act. See <http://cal-access.ss.ca.gov>.
3 However, those funds were not subject to the reporting requirements of the Act, and thus
4 do not constitute federal funds. See 11 C.F.R. § 300.71.

5 In sum, although the available information indicates that the Caserta Committee
6 may have intended to promote Caserta's candidacy, the brochure also promoted the
7 candidacies of Obama and Clinton, and was not paid for with federal funds.
8 Accordingly, the Caserta Committee appears to have violated 2 U.S.C. § 441i(f)(1) and
9 11 C.F.R. § 300.71. However, there is no basis on which to conclude that Kasperzak
10 personally violated the Act or Commission regulations, since it does not appear that he
11 paid for the brochure or was an agent of Caserta or the Caserta Committee. See 2 U.S.C.
12 § 441i(f)(1); 11 C.F.R. § 300.70.²

13 This matter does not appear to warrant further enforcement action. The available
14 information indicates that the amount of funds used to create and distribute the brochure
15 (\$4,337) was minimal, and only a portion of that sum would be allocable to the
16 promotion of federal candidates. We believe that an admonishment to the Caserta
17 Committee is sufficient in this instance. Accordingly, we recommend that the
18 Commission exercise its prosecutorial discretion to dismiss the allegation that the Caserta
19 Committee used non-federal funds to promote the election of federal candidates and

² Complainant made no allegation, nor is there evidence indicating that the Caserta Committee coordinated with either the Obama or Clinton campaigns in creating and distributing the brochure. See 11 C.F.R. § 109.21. Kasperzak denied any involvement in the creation or distribution of the brochure, acknowledging only that he authorized the Caserta Committee to use his name, affiliation with the Obama campaign, and signature for a different mailing. Further, the available information does not provide a basis on which to conclude that either the Obama or Clinton campaigns had interactions with the Caserta Committee that would satisfy the conduct prong of the coordination regulations. *Id.*

admonish the Caserta Committee. We also recommend that the Commission find no reason to believe R. Michael Kasperzak violated the Act or Commission regulations and close the file.

III. RECOMMENDATIONS

1. Dismiss the allegation that Dominic Caserta for Assembly used non-federal funds to promote the election of federal candidates.
2. Find no reason to believe R. Michael Kasperzak violated the Act or Commission regulations.
3. Approve the appropriate letter admonishing Dominic Caserta for Assembly regarding apparent violations of 2 U.S.C. § 441i(f)(1) and 11 C.F.R. § 300.71.
4. Approve the attached Factual and Legal Analysis.
5. Approve the appropriate letters.
6. Close the file.

Thomasenia P. Duncan
General Counsel

10/17/08
Date

BY:


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